Michigan Law Review

Volume 93 | Issue 6

1995

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Recommended Citation
Steven Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511 (1995).
Available at: https://repository.law.umich.edu/mlr/vol93/iss6/18

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MAKING RULES: AN INTRODUCTION

*Steven Croley**

RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY. By *Cornelius M. Kerwin.* Washington, D.C.: CQ Press. 1994. Pp. xii, 321. Cloth, $32.95; paper, $21.95.

INTRODUCTION

In Whit Stillman's recent film, *Barcelona,* the buffoonish and not-so-well-read naval attaché, Fred, questions his shy-but-sophisticated cousin, Ted, about several review essays he had just read, triggering the following amusing exchange:

> *Fred:* Maybe you can clarify something for me. Since I've been waiting for the fleet, I've read a lot.
> *Ted:* Really?
> *Fred:* And one of the things that keeps cropping up is this about "subtext." Plays and those songs — they all have subtext, which I take to mean a hidden message or import of some kind. So "subtext" we know. But what do you call the message or meaning that's right there on the surface, completely open and obvious? They never talk about that. What do you call what's *above* the subtext?
> *Ted:* .... The text.
> *Fred:* Okay. That's right! But they never talk about *that.*[1]

Rulemaking, by Neil Kerwin,[2] offers much text worth talking about. Indeed, *Rulemaking,* billed largely as an introduction to a crucial yet underappreciated facet of lawmaking, intended for students and practitioners of public administration, political science, and public policy (pp. xi-xii) — Kerwin could have justifiably added law to the list — is mostly text; most of its message is "right there on the surface." By design, the book is part primer, part literature review, part research project, and part call to scholarly arms. Though not without its imperfections, it succeeds on all of these fronts: *Rulemaking* is not only a helpful introduction to the "hows" (note its subtitle) and "whys" of rulemaking, but also a significant contribution to the scholarly literature on rulemaking. That contribution is not the only reason administrative law scholars should resist any temptation to pass over an introductory book published by

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1. BARCELONA (Fine Line Features 1994).

2. Dean and Professor, School of Public Affairs, American University.

a nonacademic press, however, for *Rulemaking*'s subtext reveals something about what the most fruitful future work in the field might look like.

I. Some Context: Rulemaking

Rulemaking by federal administrative agencies is one of the most important lawmaking functions of the U.S. government. Kerwin thus rightly dispenses with tentativeness:

> Between Congress and the people it represents and the goals we seek to achieve when a law is written stands a crucial intermediate process. We have come to rely on rulemaking to an increasing degree to define the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society.[3]

As Kerwin explains, rulemaking is the most important device federal agencies use to specify, clarify, and refine Congress's work-product — in short, to finish the task of legislating. This is true not only for especially broad, open-ended pieces of legislation. Even when Congress speaks at considerable length and with considerable specificity, agencies must engage in substantial statutory gap-filling. For example, as Kerwin notes, the Clean Air Act Amendments of 1990[4] required at least several hundred new regulations (by the Environmental Protection Agency's (EPA) count) before it could become operational (p. 2). Measured qualitatively as well, agency rules constitute a genus of public law of the highest importance.[5] Accordingly, Kerwin seeks, above all else, to generate increased attention to this dimension of American governance[6] — to an institution Kenneth Culp Davis famously described as "one of the greatest inventions of modern government."[7] But first, just what *is* that invention?

Rulemaking takes several forms. According to section 553 of the Administrative Procedure Act of 1946 ("APA" or "Act")[8] —

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3. P. 2; *see also* p. 85 ("[W]hat goes on during and emerges from rulemaking is at least equal in importance to any other element of our public policy process.").

4. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

5. *Orders,* the product of agency *adjudication* processes, constitute the other main genus of agency decisionmaking. Adjudication is conducted according to §§ 554, 556, and 557 of the Administrative Procedure Act of 1946 (APA), 5 U.S.C. §§ 551-559, 701-706 (1988), which specify agencies' formal hearing processes and require a separation of powers between an agency's executive-prosecutorial and its judicial arms. Whereas rulemaking resembles decisionmaking according to the legislative model, adjudication resembles decisionmaking according to the judicial model. *See, e.g.,* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) (comparing rulemaking and adjudication).

6. At several points, Kerwin suggests that the success of the American political system turns on the success of rulemaking. For example: "[T]he health of our democracy now hinges in no small part on how well rulemaking works." P. 293.

7. Kenneth Culp Davis, Administrative Law Treatise § 6.15, at 283 (Supp. 1970).

8. Section 553 provides, in relevant part:

an act that serves as the "constitution" of the administrative state[9] — agencies authorized by statute to issue "legislative"[10] rules without first providing a hearing on a record can do so simply by following three basic steps. First, the agency must apprise potentially interested parties that it is contemplating adopting some proposed rule. Second, the agency must allow those parties an opportunity to respond to the agency's proposed rule. Third, after receiving any such responses and generating whatever additional information the agency thinks necessary to consider, the agency must promulgate, at least thirty days before the rule is to take effect, a "concise general statement" explaining why the rule took the final form it did.[11] Thus do agencies engage in "ordinary" or "informal" or "notice-and-comment" rulemaking.

Ordinary rulemaking is distinguished first from "formal" rulemaking. The words "hearing" and "record" (more precisely, the legal equivalents of these terms[12]) in an agency's statute triggers formal rulemaking.[13] In the formal rulemaking mode — employed only for limited categories of agency decisions, such as ratemaking and decisions dealing with food additives — an agency must con-

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(b) General notice of proposed rule making shall be published in the Federal Register .... The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. ...

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553 (1988).

9. To push the analogy further than it can probably go, if the APA is the constitution of the administrative state, then its legislative history, *see* SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946), constitutes its convention debates; the Attorney General's Committee Report, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941), its *Federalist;* and the Walter-Logan bill, S. 915, 76th Cong., 1st Sess. (1939); H.R. 6324, 76th Cong., 1st Sess. (1939), its anti-federalist alternative.

10. Section 553's notice and comment processes are not required for "procedural" or "interpretive" rules. 5 U.S.C. § 553(b)(3)(A) (1988); *see, e.g.,* Alaska v. U.S. Dept. of Transp., 868 F.2d 441, 445 (D.C. Cir. 1989) (distinguishing legislative or substantive rules from "interpretive rules" or "general statements of policy"). A "rule" for the purposes of the APA is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (1988).

11. Often, the second stage involves successive rounds of notice and comment. *See, e.g.,* Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34 (1983) (approximately 60 rounds of notice and comment before promulgation of final rule).

12. *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) (holding that mere appearance of words "after hearing" in agency's statute is neither necessary nor sufficient to trigger formal rulemaking under §§ 553(c), 556-557).

13. 5 U.S.C. § 553(c) (1988).

duct a hearing during which parties may provide testimony, present evidence taken on a record, and cross-examine adverse witnesses.[14] If the agency deems that prejudice will not result from the written submission of evidence, it can conduct formal rulemaking, in effect, through the mail,[15] in which case formal rulemaking partially resembles informal rulemaking. Even here, however, evidence is recorded, and all other requirements of formal rulemaking still apply.

As Kerwin explains, agencies' rulemaking obligations — whether in the formal or informal mode — do not always appear on the face of the virtually unamended APA.[16] First, some of those obligations have been identified by federal courts in the course of interpreting the Act's provisions. For example, courts have held that section 553's "notice" must explain the general factual or other bases on which a proposed rule rests, in order to give potentially interested parties a fair opportunity to respond with comments, and furthermore that 553's "concise general statement" cannot be so concise or general that courts cannot effectively review an agency's final rule.[17]

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14. 5 U.S.C. §§ 556-557 (1988).

15. 5 U.S.C. § 556(d) (1988).

16. P. 55. The core rulemaking provisions of the APA remain the same today as they appeared in 1946, though the Act was recodified in 1966 as part of Title 5 (specifically, chapters 5 ("Administrative Procedure") and 7 ("Judicial Review") of Part 1, "The Agencies Generally," of Title 5, "Government Organization and Employees," of the U.S. Code). In that same year, the old § 3 was rewritten to become the Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)). Chapter 5 was amended in 1974 to house the Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (1988)), and again in 1976 to house the Sunshine Act, Pub. L. No. 94-409, § 3(a), 90 Stat. 1241, 1241-46 (1976) (codified at 5 U.S.C. § 552b (1988)).

Since 1946, Congress has made only two substantive changes to the core provisions of the APA governing administrative procedure and judicial review. Along with the passage of the Sunshine Act in 1976, Congress amended § 557(d) — which governs formal adjudication and formal rulemaking processes — to forbid ex parte communications in formal evidentiary proceedings. Congress amended §§ 702 and 703 that same year to eliminate the sovereign immunity defense in a certain class of cases. For a helpful overview of the stability of the APA, which offers explanations for its durability that resonate with Kerwin's, see William H. Allen, *The Durability of the Administrative Procedure Act,* 72 VA. L. REV. 235 (1986).

17. *See, e.g.,* Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994); American Medical Assn. v. United States, 887 F.2d 760, 767-69 (7th Cir. 1989) (explaining principles relevant in determining whether notice was sufficient); Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir.) (explaining "logical outgrowth" test to determine whether notice was sufficient), *cert. denied,* 488 U.S. 888, *and cert. denied,* 488 U.S. 901 (1988); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1024 & n.11, 1030-31 (D.C. Cir. 1978); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that information on which agency bases rule cannot be known only to agency), *cert. denied,* 417 U.S. 921 (1974).

Although courts have had to give meaning to the non-self-defining vocabulary of § 553 — "notice," "opportunity to participate," and "concise general statement," for example — courts do not impose upon agencies procedural requirements beyond those found in the APA, unless Congress has done so. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (explaining that courts cannot impose upon agencies decisionmaking procedures above what APA requires); Ethyl Corp. v. EPA,

More important, the other two branches have supplemented agencies' rulemaking obligations by subsequent legislation and executive order. Sometimes these supplemental requirements are directed to particular agencies, as in the case of the Toxic Substances Control Act,[18] which requires the EPA to develop rules governing the testing of substances based on considerations of costs and a range of specified health risks (p. 58). Other statutes supplementing the APA's rulemaking requirements apply to all agencies, such as the National Environmental Policy Act,[19] the Paperwork Reduction Act,[20] and the Regulatory Flexibility Act.[21] These acts require rulemakers to assess the environmental impact of certain rules, develop information on the paperwork burden that will accompany rules, and reduce the burden of rules on small entities, respectively. In addition to such legislation, executive orders requiring specific consideration of the costs and benefits of proposed major rules significantly add to rulemakers' obligations.[22]

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541 F.2d 1, 33-34 (D.C. Cir. 1976) (stating that where statute does not indicate otherwise, informal rulemaking procedures are conducted under § 553), *cert. denied,* 426 U.S. 941 (1976); *see also* American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966). So while commentators are in one sense correct that the APA has proved resistant to statutory amendment in part because of subsequent judicial interpretation, the point that Congress has not amended the APA because the judiciary has done so can be overstated. Judicial interpretation of key terms of the APA does not distinguish the APA from many other statutes that become operational only after judicial interpretation of key terms. To say as Kerwin does (pp. 52, 55-56, 71-72) that, in part due to judicial interpretation of the APA, rulemaking no longer looks like what the framers of the Act had envisioned raises the question of what the APA envisioned in the first place, which is just the question that the courts interpreting the Act aim to answer.

18. 15 U.S.C. §§ 2601-2629 (1988 & Supp. V 1993).

19. 42 U.S.C. §§ 4321-4347, 4361-4370d (1988 & Supp V 1993).

20. 44 U.S.C. §§ 3501-3520 (1988 & Supp. V 1993).

21. 5 U.S.C. §§ 601-612 (1988 & Supp. V 1993). These acts do not change the essential procedures that rulemaking agencies employ as much as they require agencies, when doing their own evaluations of proposed rules, to consider certain specific consequences of those rules. Kerwin thus appropriately calls these statutes "information statutes." Pp. 59-60.

22. Kerwin mentions President Reagan's famous executive orders, Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988); Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988), which he argues evolved from an executive order of President Carter, Exec. Order No. 12,044, 3 C.F.R. 152 (1978), *reprinted in* 5 U.S.C. § 553 (1976 & Supp. II 1978). Pp. 62, 125. After *Rulemaking* was written, President Clinton issued an executive order, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (Supp. V 1993), which formally rescinds Reagan's orders but retains many of their essential requirements, such as consideration of the costs and benefits of major rules and coordination among rulemaking agencies with overlapping jurisdictions. Proposed legislation currently before Congress would bring back some of the specifics of President Reagan's executive orders. *See infra* notes 71-74 and accompanying text.

In contrast to judicial interpretation of the APA's language, and to a greater extent than the statutes mentioned immediately above, *see supra* notes 18-21 and accompanying text, executive orders have changed rulemaking *processes* in a fundamental way. Under Executive Order 12,866, for example, agencies are required, among other things: to submit to the Office of Information and Regulatory Affairs (OIRA) plans setting forth an agency's major rulemaking agenda, to provide OIRA with the draft text of major rules, to provide OIRA with information animating the agency's decisionmaking rationale, including some form of

The Negotiated Rulemaking Act of 1990[23] also applies to agencies across the board, authorizing but not requiring agencies to organize and conduct negotiations among parties interested in a particular rule. The Negotiated Rulemaking Act essentially codified and routinized a practice agencies sometimes employed to generate a consensus among interested parties prior to promulgating a proposed rule. In a negotiated rulemaking, the agency convenes a committee composed of representatives of parties whose interests are implicated by the rule an agency seeks to develop.[24] Along with the agency, and with the help of an outside facilitator, the committee members negotiate in an attempt to formulate a proposed rule that all find acceptable. Ordinary notice-and-comment processes commence once participants in the negotiated rulemaking have come to a consensus about the form of a proposed rule. But, at least according to negotiated rulemaking's proponents, ordinary notice-and-comment proceeds more quickly and with less conflict than it would have in the absence of prior negotiations.[25]

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cost-benefit analysis, and — once a rule has been published in the *Federal Register* — to identify for the public the changes between the draft rule submitted to OIRA and the final action taken. Exec. Order No. 12,866 §§ 4(c), 6, 3 C.F.R. at 642-48. Note, however, that executive orders are largely exhortatory for independent, as opposed to executive, agencies. *See, e.g.*, Exec. Order No. 12,291 § 1(d), 3 C.F.R. at 128; Exec. Order No. 12,866 §§ 3(b), 9, 3 C.F.R. at 641, 649; Exec. Order No. 12,838 § 5, 3 C.F.R. 590 (1993), *reprinted in* 5 U.S.C. app. § 14 (Supp. V 1993). For a thoughtful investigation of the significance of Executive Order 12,866, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

23. 5 U.S.C. §§ 561-570 (Supp. V 1993).

24. The convening of a regulatory negotiating committee is carried out pursuant to the Federal Advisory Committee Act (FACA). 5 U.S.C. app. §§ 1-15 (1988). Passed in 1972, the FACA governs reliance by the President and by agencies upon outside advisors. Like the Negotiated Rulemaking Act, Congress passed the FACA in an effort to routinize informal practices that agencies had already developed. Like the Sunshine Act, the FACA was designed in part to open those practices up to public oversight and participation. In brief, the FACA requires that an advisory committee be established only after a determination that the public interest so requires, that every advisory committee have a clearly defined purpose and limited life-span, that every advisory committee have a membership representing diverse points of view, and that advisory committees' activities be subject to review by agencies, the President, the Congress, and the public. 5 U.S.C. app. §§ 5, 9-11, 14 (1988).

25. In explaining negotiated rulemaking, Kerwin borrows from Philip Harter, who encouraged its use in the years surrounding the passage of the Negotiated Rulemaking Act and has participated in many negotiated rulemakings. *See* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982). As Kerwin notes (p. 185), negotiated rulemaking can be traced back to the collaborative rulemaking processes of the New Deal, which the Supreme Court eventually struck down as unconstitutional delegations of legislative power. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). As Kerwin also explains (p. 185), some four decades later Secretary of Labor John Dunlop encouraged the use of consensus-building techniques during the development of rules governing workplace safety. For a helpful treatment of negotiated rulemaking as of 1986, see Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); Henry H. Perritt, Jr., *Negotiated Rulemaking in Practice*, 5 J. POLY. ANALYSIS & MGMT. 482 (1986). *See generally* DAVID M. PRITZKER & DEBORAH S. DALTON, ADMINISTRATIVE CON-

"Hybrid rulemaking" constitutes yet a fourth species of rulemaking — "hybrid" because this mode is more formal than ordinary rulemaking but less so than formal rulemaking.[26] Like negotiated rulemaking, hybrid rulemaking involves legislative supplementation to section 553's requirements. Unlike negotiated rulemaking, however, hybrid rulemaking statutes selectively apply to particular agencies. Typically, hybrid rulemaking requires those agencies to conduct public hearings in the course of developing a rule. This effort to expand opportunities for outside participation in rulemaking peaked in the early 1970s, after which time hybrid rulemaking lost its popularity. Because formal rulemaking and hybrid rulemaking are not widely used today,[27] and because negotiated rulemaking's use so far has been limited, most of *Rulemaking* focuses, implicitly, on section 553, notice-and-comment rulemaking.[28]

This is not to imply that the dominant species of rulemaking started with the APA. To the contrary, the APA's rulemaking provisions constituted more of an endorsement than a creation of rulemaking. As Kerwin explains, rulemaking extends back to the first Congress (p. 45), though of course large-scale bureaucracies with substantial organizational resources did not emerge until the end of the nineteenth century. In fact, one of the virtues of *Rulemaking,* even for the initiated, is the supply of little-known facts and anecdotes Kerwin provides in explaining how rulemaking was an important government function before the passage of the APA.[29] He mentions, for example, that the Interstate Commerce Commission (ICC) promulgated numerous important rules in the years immediately following the passage of the Motor Carrier Act of 1935.[30] And while Kerwin carefully outlines the history of rulemaking — explaining the American Bar Association's strong resistance to increased reliance on rulemaking during the New

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FERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK (1990). Kerwin himself has undertaken a study of negotiated rulemaking by the EPA. *See infra* note 46.

While most agencies are authorized to use negotiated rulemaking as they see fit, Kerwin explains that occasionally agency use of federal advisory committees is required for the development of certain rules, as under the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(B) (1988), for example. P. 68.

26. *See generally* Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. CHI. L. REV. 401 (1975).

27. *See, e.g.,* BENJAMIN W. MINTZ & NANCY G. MILLER, ADMINISTRATIVE CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 3-5 (2d ed. 1991).

28. *See* ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 47 (2d ed. 1992) (most rulemaking governed by § 553).

29. Some of these Kerwin mines from the U.S. ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941).

30. Pub. L. No. 74-255, 49 Stat. 543 (codified as amended at 49 U.S.C. §§ 301-327 (1988)).

Deal, Roosevelt's veto of the Walter-Logan Bill,[31] and the eventual expansion of rulemaking during the 1960s and 1970s — he helpfully points out that large-scale rulemaking even in complex scientific areas predates the 1960s (pp. 12-13).

As Kerwin acknowledges, *Rulemaking* is not the first book to treat the topic (p. xii), nor are more complete historical sketches unavailable.[32] Gary Bryner's *Bureaucratic Discretion,*[33] for example, focuses on rulemaking in an attempt to ascertain the extent to which bureaucratic decisionmakers' own goals shape regulatory policy decisions. Wesley Magat, Alan Krupnick, and Winston Harrington's *Rules in the Making,*[34] for another example, provides a statistical study of rulemaking in the context of EPA effluent standards. And William West's *Administrative Rulemaking: Politics and Processes*[35] explores rulemaking by the Federal Trade Commission.[36] Beyond these, numerous articles by administrative law scholars, as well as publications and reports by the Administrative Conference of the United States (ACUS), treat various aspects of agency rulemaking.[37]

II. *RULEMAKING* ON RULEMAKING

So what does Kerwin contribute, besides an accessible explanation of the different species of rulemaking and an interesting historical summary of this important governmental function? For one thing, *Rulemaking* is broad in scope. Unlike most if not all of the prior work on rulemaking, Kerwin's book generalizes across time, across agencies, and across statutory programs. Three themes tie Kerwin's holistic treatment of rulemaking together: information,

31. As Kerwin explains, the Walter-Logan Bill of 1940 would have eliminated agencies' informal rulemaking powers in favor of more formal adjudication powers. Pp. 49, 169.

32. *See, e.g.,* MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION (1993).

33. GARY C. BRYNER, BUREAUCRATIC DISCRETION (1987).

34. WESLEY A. MAGAT ET AL., RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR (1986).

35. WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES (1985).

36. While the literature is not voluminous, other significant works include ROSS E. CHEIT, SETTING SAFETY STANDARDS (1990) (comparing private and public organizations' development of rules); A. LEE FRITSCHLER, SMOKING AND POLITICS (4th ed. 1989) (taking rulemaking as focal point of "subsystem" politics); JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING (1983) (legal treatise on rulemaking).

37. Significant scholarly articles on the topic include, just for example, Harold H. Bruff, *Presidential Management of Agency Rulemaking,* 57 GEO. WASH. L. REV. 533 (1989); James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 VA. L. REV. 257 (1979); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking,* 47 ADMIN. L. REV. 59 (1995). The ACUS is an important catalyst for the study of rulemaking. In *Rulemaking,* Kerwin frequently relies on ACUS's A GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 27; *see also* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 28.

participation, and accountability. These constitute, according to Kerwin, the "core elements of rulemaking" (p. 52). Although he does not put it in exactly these terms, Kerwin's message about the core elements of rulemaking can be summarized as follows.

Rulemaking is by and large an institution to facilitate the necessary exchange of information between agencies and outside parties. Agencies, however "expert" they may be, are not omniscient. They need information to generate rules. Often, outside parties possess information relevant to a rule an agency must develop. Rulemaking processes provide a mechanism for the transfer.

And the exchange is bilateral. When an agency initially solicits comments during the first notice-and-comment phase of informal rulemaking, this very act discloses to outside parties information about the agency's agenda and the direction in which the agency might proceed. The agency's solicitation invites interested parties — including other agencies, federal or state, as well as private groups — to provide the agency with information about the form its proposed rule should take. Parties respond by answering the invitations, thus supplying the agency with needed information. The agency further reveals information in subsequent rounds of notice and comment, as the agency's information forms the basis of its responses to the comments it receives. Based on the agency's responses to the parties' responses, the parties come forth with additional information, hoping to shape the agency's decisionmaking yet further. And so on. After the fact, agencies disclose still more information upon providing the requisite concise general statement setting forth the agency's rationale for the final rule developed.

Information is thus a prerequisite for participation in rulemaking processes — hence the link between Kerwin's first two themes. In the first instance, potential participants must know which proposed rules an agency is contemplating. Kerwin explains that the *Federal Register,* in which agencies promulgate notices of proposed rulemakings, serves as a kind of regulatory bulletin apprising readers of what agencies intend to do.[38] No less importantly, potential

38. Pp. 63-64; *see also* MINTZ & MILLER *supra* note 27, at 132-34. Passed in 1934, the Federal Register Act, Pub. L. No. 90-620, 82 Stat. 1273 (codified as amended at 44 U.S.C. §§ 1501-1511 (1988)), requires publication of certain regulatory documents in the *Federal Register* and permanent codification of rules in the *Code of Federal Regulations.* Pursuant to the Act, the Administrative Committee of the Federal Register prescribes, with presidential approval, regulations for carrying out the Act. Because these regulations affect the form of *Federal Register* publications, they have a significant impact on the agencies' disclosure of information during rulemaking processes. As Kerwin notes, for example, the Administrative Committee's regulations require that preambles accompany all proposed and final rules published in the *Federal Register* and that such preambles "inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal." 1 C.F.R. § 18.12(a) (1995). This means that preambles for major rules often are longer than the rules themselves, running for several hundred pages.

participants must have some capacity to develop information upon which to base comments responding to the agency's proposed rule. The possession or lack of information, in other words, effectively circumscribes the set of parties "eligible" to participate in the development of rules.[39] As a practical matter,[40] only parties with information bearing on a proposed rule are eligible to participate in rulemaking.

Very often, outside parties do have information bearing upon a proposed rule and thus do participate in rulemaking. Thankfully so, according to Kerwin, for participation by outside parties enhances the political legitimacy of authoritative rules developed by officials not directly accountable to the citizenry.[41] Kerwin's analysis thins here, however, for he uses the term "public participation" in two very different ways. Sometimes, Kerwin uses public participation to refer to participation in rulemaking by representatives (actual or putative) of the public, or at least of broad-based interests — typically, the intended beneficiaries of the legislation upon which a rule will be based, as opposed to those who will most directly bear its costs.[42] Elsewhere, however, he uses public participation interchangeably with participation by "regulated parties," not representatives of the larger public at all.[43]

But one can, and should, distinguish between participation by representatives of broad-based interests and participation by representatives of regulated parties, for the two have different implications for the political legitimacy of rulemaking. After all,

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The APA requires that "notice of proposed rule making . . . be published in the Federal Register, *unless* persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b) (1988) (emphasis added). Thus, absent a showing by the agency of actual notice by some other means, a court may invalidate or remand a rule not preceded by notice in the *Federal Register*. *See, e.g.*, PPG Indus., Inc. v. Costle, 659 F.2d 1239, 1249-51 (D.C. Cir. 1981).

39. Kerwin refers to an Office of Management and Budget (OMB) study completed during the Carter Administration finding that the *Federal Register* is not a completely reliable method of agency outreach to potential participants. Pp. 174-75. Agencies have since experimented with more accessible and understandable media, such as newspapers, radio, and mass mailings. P. 176.

An annual subscription to the *Federal Register* costs $494 ($375 on-line, $433 microfiche). As of January 1995, it had 13,750 subscribers. Telephone Interview with General Accounting Office Marketing Department (Mar. 14, 1995). Interestingly, the *Federal Register* periodically offers free three-hour briefings, open to the public, on the *Federal Register* system and the development of regulations.

40. Legally, any party whosoever may answer a notice of proposed rulemaking by sending comments to the agency developing the rule. But any party seeking to affect the shape of the final rule must have information that adds to the agency's stock of useful information.

41. P. 161 ("To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision." (quoting Harter, *supra* note 25, at 17)).

42. *See, e.g.*, pp. 57, 80, 161, 171.

43. *See, e.g.*, pp. 54, 165.

participation in rulemaking only by those subject to the rules might compromise, rather than advance, agencies' political legitimacy. One cannot safely assume that those who will bear the costs of final rules will provide agencies with reliable information about early versions of those rules.[44] Information about the quality of information is one type of advantage outside parties may have over agencies. To the extent that participation by regulated parties results in rules predicated on skewed or incomplete information strategically provided by those parties, participation exacerbates rather than ameliorates concerns about political legitimacy.

More serious, perhaps, is the threat that regulated parties will enjoy illicit influence. Rather than take advantage of their better information, private parties might cooperate with agencies to develop rules that, at the extreme, advance the private interests of those parties and undermine the legislation upon which the rules are based. Rent-seeking by regulated interests sometimes entails agency collaboration.

None of this is to suggest, however, that informed parties will enjoy influence, illicit or otherwise, on an agency's development of a rule in any given case. First, agencies act largely at their own discretion concerning the weight they will attach, if any, to information received during a rule's development. Setting aside agencies' own interests in generating the most informed rules, nothing else — certainly not the APA — compels agencies to do anything but ignore parties' input.[45] More important, an agency's choice among possible rules is influenced by more than its exchange of information with informed outside parties. After all, rulemaking hardly takes place in a political vacuum; agencies also respond to stimuli from Congress, the White House, and even the courts in the course of developing rules — hence the link to Kerwin's third element of rulemaking, accountability.

Accountability is two-edged. Insofar as the forces to whom agencies are accountable seek to advance general interests, greater accountability is desirable. Here accountability helps ensure that rulemakers stay within proper bounds. Insofar as the forces to whom agencies are accountable seek rules that benefit narrow interests to the greater detriment of general interests, on the other

44. Though Kerwin seems to do so at one point: "First, *industry,* broadly defined, is the most reliable source of information on its own processes, and products." P. 102.

45. The possibility of ex post judicial review helps to ensure that agencies do not ignore relevant data, however. Courts review agencies' rules, pursuant to APA § 706(2)(A)-(D), by applying a fairly deferential "arbitrary [or] capricious" standard, according to which a rule must have a "rational" evidentiary basis. *See generally* Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

hand, greater accountability is undesirable. Here accountability facilitates illicit influences on rulemakers. And the nature of oversight that each branch of government exercises over agencies, and thus over rulemaking processes, in turn depends on who participates in rulemaking and with what information they do so.

No doubt, this analysis oversimplifies; information, participation, and accountability are related in even more complicated ways than described. One can begin to specify those ways, as Kerwin does, based on perfectly plausible assumptions about such matters as: whether private participants in rulemaking processes more often represent broad or narrow interests; whether agency personnel usually act to further their own conceptions of the public interest or instead collaborate with regulated parties in some quid pro quo; whether Congress and the White House seek to shape rulemaking processes to promote general interests or to please narrow but powerful constituencies; and whether agencies are highly responsive to congressional signals or instead merely placate concerned congressmembers until they turn their attention elsewhere. And these include but a few of the questions that must be answered before one can fully unpack the relationships among information, participation, and accountability. But while one can make plausible assumptions about such matters *ad infinitum,* even the most sensible postulations can further the understanding of rulemaking only so far. Sooner or later, one must turn to data on how rulemaking processes really work. Unfortunately, however, facts on information, participation, and accountability are quite scarce.

Fortunately, Kerwin understands this perfectly well,[46] as *Rulemaking* demonstrates. In it, Kerwin furthers what is known about these elements, participation in particular, by making several small but significant contributions to the body of empirical work on rulemaking. First, Kerwin conducted a survey of agencies asking agency personnel how rulemaking processes were managed by their particular agency.[47] Among other things, he found that for 63% of agencies, prior authorization from senior agency management is required to begin a rulemaking; that 70% of agencies occasionally use outside contractors during the development of a rule to supplement the agencies' own expertise; that only one of the thirty-five agencies

46. Dean of the public policy school at American University, Kerwin is also an accomplished political scientist. Former Chair of the American Political Science Association's Section on Public Administration, he and a colleague (Professor Laura Langbein) were recently enlisted by the EPA to undertake a comprehensive empirical study of negotiated rulemaking to assist the Agency in carrying out its assessment of negotiated rulemaking as a decision-making technique. In short, Kerwin is an empiricist as well as a thoughtful commentator. *See, e.g.,* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory,* 2 J. PUB. ADMIN. RES. & THEORY 113 (1992).

47. He also consulted agency guidance documents and practice books, whenever available, setting forth internal guidelines of agency rulemaking. P. 128, app. B.

surveyed informs interested members of Congress of the progress being made during the development of a rule; and that only two agencies allow their staff involved in a rulemaking to maintain a liaison with the OMB (p. 144). Little follows from these facts alone, but the survey provides one useful starting point for further consideration of intra-agency rulemaking processes and of the relationship between those processes and presidential, public, and congressional oversight. Specifically, Kerwin's survey of agencies raises several questions worthy of follow-up research. For example: If in most agencies prior authorization from agency management is required to initiate a rulemaking, does that authorization usually come from political appointees or instead from senior agency bureaucrats? To what extent does agency reliance on contractors test the limits of nondelegation? And how do the White House and Congress influence the development of a rule if the rulemaking staff of most agencies does not communicate with members of Congress or the OMB during the rule's development?

Of course, the results of Kerwin's survey of agencies speak to the rulemaking process from agencies' vantage point. Kerwin also sheds light on the issue of participation in those processes by outside groups. First, in an effort to gauge the extent to which rulemaking triggers participation from outside groups, Kerwin analyzed all rules published in the *Federal Register* from December 1990 through June 1991. This seven-month period (chosen randomly) generated a total of 1985 rules (p. 193). Relying on information in the rules' preambles,[48] Kerwin calculated for each month in question the percentage of rules that had been preceded by a notice of proposed rulemaking and, more important, the percentage of rules preceded by a notice of proposed rulemaking that actually generated comments from outside parties. He found that notice of proposed rulemaking preceded 43% of the examined rules,[49] and that 60% percent of those triggered commentary (p. 195).

Kerwin's 60% figure is indicative of the overall frequency of participation in notice-and-comment rulemaking, but reveals little about how participation in rulemaking ranks relative to other forms of political participation. To address this issue, Kerwin conducted a survey of Washington-based interest groups, asking the groups

48. *See supra* note 38.

49. Given that § 553 requires notice of a rulemaking, Kerwin's 43% figure seems surprisingly low, as he observes. Kerwin hypothesizes that some of the 1985 rules were exempted from notice requirements. Almost certainly this accounts for much of the gap, as interpretive and procedural rules do not require prior notice. *See supra* note 10. As Kerwin also points out, final rules may not always reflect prior notice. Kerwin suggests, however, that agencies may not always follow notice requirements, noting that other studies also suggest some pattern of noncompliance with the notice requirement of § 553. P. 193. At any rate, examination of the text from a sample of Kerwin's set of rules would clarify this matter.

(among other things) how they compared the importance of their participation in rulemaking to their participation in lobbying, litigation, and grassroots organization, and how much of their annual budget they committed to rulemaking. Of the one hundred and eighty groups that responded, a substantial majority reported that they considered their rulemaking activities to be of equal or greater importance than lobbying activities (66.9%), grassroots political work (67.2%), political contributions (69.9%), and litigation (78.6%) (p. 194). Kerwin also found that participation in rulemaking varies across different types of interest groups. Ninety percent of trade associations, 88% of business groups, and 80% of labor unions responding to the survey indicated that they participate in rulemaking activities, while only 59% of citizens' groups — consumer groups and environmental groups — indicated that they participate in rulemaking (p. 196). Further, citizens' groups allocate on average 9.4% of their annual budgets to rulemaking, while trade associations and business groups allocate 15.5% and 17.3%, respectively (p. 197).

Providing a glimpse of what kinds of comments interest groups communicate to agencies, Kerwin reports that of those groups that participate in rulemaking, 83.4% suggested that they "almost always" raise issues concerning the quality of information supporting a proposed rule, while 77.2% indicated that they almost always raise concerns about the cost of complying with the rule, but only 27.5% indicated that they almost always question the rulemaking agency's legal authority to issue the rule.[50] Finally, Kerwin's survey taps interest groups' perceptions about the efficacy of their participation in rulemaking. Of the groups that participate in rulemaking, 15.9% indicated that they consider their participation successful — where success means having some influence on the final shape of the rule — merely one-quarter of the time, 40.9% indicated that they consider their participation successful one-half of the time, and a full 42.4% indicated that they consider their participation successful three-quarters of the time (p. 209). Kerwin's data do not capture groups' perceptions about the *magnitude* — perceived or real — of their influence on the development of rules, but it is noteworthy that groups believe that participation in rulemaking so often has some real impact on the development of rules sufficient to justify the cost of participating.

To be sure, one must be cautious about drawing strong conclusions from Kerwin's data. His analysis of rules promulgated in the

50. P. 198. In addition, Kerwin reports that 75.4% of the groups that participate in rulemaking suggested that they almost always raise concerns about the clarity of proposed rules, 85.6% raise concerns about compliance options, and 72.5% address the time for compliance with proposed rules. P. 198.

Federal Register does not distinguish between legislative rules on one hand and interpretive and procedural rules on the other. And his survey data also must be approached mindful of the dangers associated with survey data.[51] Even so, properly understood, both Kerwin's analysis of almost two thousand rules and his extensive survey of Washington interest groups provide real insight into who actually participates in rulemaking, to what extent, and with what concerns. These contributions alone would render *Rulemaking* a significant addition to the scholarship on rulemaking. Together with its survey of agencies and its helpful overview of the basic historical, legal, and political dimensions of rulemaking, *Rulemaking* is a welcome source even to those already familiar with rulemaking's basics.

Not to oversell the book, *Rulemaking* does have its soft spots, in addition to its overtaxing of the concept of public participation. For one, its logic is occasionally rather loose. For example, throughout the book Kerwin argues as if the premise that delegation of legislative authority is necessary — given the demands of the American citizenry, on one hand, and the scarcity of time and other resources Congress faces, on the other hand — compels the conclusion that rulemaking is necessary. Indeed, the necessity of rulemaking is a leitmotif of *Rulemaking*.[52] But Congress could respond to the great demands placed upon it in other ways; assuming delegation is necessary, Congress need not necessarily delegate rulemaking power specifically. And even if delegating some kind of rulemaking power were inevitable, still rulemaking in its current particular form is not indispensable.[53] Nevertheless, Kerwin several times suggests that the subject of *Rulemaking* — notice-and-comment rulemaking with supplemental statutory overlays — is a linchpin of U.S. democracy.[54] Perhaps Kerwin's mistake is a consequence of the fact that rulemaking just so happens to be the primary form in which agencies delegated lawmaking powers exercise those powers: Taking congressional delegation of lawmaking power to be unavoidable, and then observing that delegation so often takes the form of rulemaking power, Kerwin seems to conclude that rulemaking is inevitable. But to establish that *rulemaking*, as opposed to other forms of exercising delegated powers — including other imaginable species of rulemaking — is indispensable, Kerwin would have to provide some argument suggesting that rulemaking currently makes possible what no other mode of agency decisionmaking does.

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51. For one thing, survey respondents may have incentives to provide particular answers, as Kerwin observes. P. 208.

52. *See, e.g.*, pp. 27, 29-30, 161.

53. After all, rulemaking as we know it is not a feature of all other modern democracies.

54. *See, e.g.*, pp. 27, 161, 293.

Familiar collective action and principal-agent models together provide one framework helpful for understanding both the strength of Kerwin's position that delegation is necessary and the vulnerability of his position that rulemaking is necessary. The necessity of legislative delegation stems, in part, from the collective action problems Congress faces. Because individual legislators have their own personal sets of interests, goals, and ambitions, and because these do not always overlap with the interests, goals, and ambitions of Congress collectively, single members seldom have powerful incentives to contribute to — what are for Congress as a whole — collective goods. More concretely, individual members of Congress typically have little incentive to invest the resources necessary to become experts about, for example, pending legislation concerning the effects of a particular carcinogen on the environment.[55] So Congress does just what the citizenry, facing the same collective action problems and interrelated time and information constraints, does: It delegates power. Just as the citizenry must delegate power to Congress, so Congress must delegate power to agencies. The legislature thus empowers the EPA to study carcinogens so that individual members can pursue other goals.

But delegation introduces problems of its own. Perhaps most important, those to whom power is delegated — the agents in a principal-agent relationship — often have interests, goals, and ambitions of their own that may diverge from those of the delegators — the principals. Principals may attempt to develop safeguards to help ensure that agents do not further their own interests at the expense of their principals' interests. As Kerwin discusses (pp. 216-29), Congress employs several oversight techniques to monitor agencies. But any such oversight mechanisms are costly, and, moreover, they introduce collective action problems anew, as the monitoring of agents of multiple principals is itself a collective good. The question thus becomes whether rulemaking solves more collective action problems than the agency problems it creates. And if the answer to this question is yes from Congress's vantage point, is it also yes from the citizenry's vantage point, given that congressional delegation of rulemaking power may make it more difficult for the citizenry to monitor its agents in Congress?[56] On these questions, *Rulemaking* provides little guidance.

Second, Kerwin resists drawing certain inferences that his data make tenable. Specifically, his survey results indicating that citi-

55. Certainly Congress as an institution faces other constraints, such as scarcity of time, information, and other resources. But these constraints in turn are very closely related to the problem of collective action.

56. Perhaps revealingly, Kerwin at one point leaves out the citizenry, the "first" principal in the principal-agent chain, when discussing the advantages rulemaking brings to the main actors in the political system. Pp. 32-35.

zens' groups allocate roughly 9% of their average budgets to rulemaking while business groups allocate roughly 17% of theirs, coupled with the results that interest groups as a whole perceive that participation in rulemaking is efficacious, suggest that business and trade groups enjoy greater influence on the development of rules than do consumer groups. One cannot conclude as much decisively, but Kerwin's data are highly suggestive, especially remembering first that the absolute size of business groups' budgets almost certainly greatly exceeds the size of consumer groups' budgets,[57] and moreover that business groups outnumber consumer groups.[58] In absolute dollars, then, business groups expend many more resources on participation in rulemaking — participation that interest groups generally perceive to be worth the costs.[59]

Yet, Kerwin resists drawing any tentative conclusions about lopsided influence in rulemaking, suggesting instead that perhaps "businesses and trade associations are so frequently threatened by rulemaking that comparatively fewer can afford to devote their attention elsewhere" (p. 199). He further suggests that the fact that a high percentage of participating groups report that they raise compliance concerns may account for the mere appearance of the overrepresentation of business interests; other groups, the argument goes, do not have a great stake in compliance matters. But surely compliance concerns are not unique to business interests, although the direction of their concerns probably is. That is, business groups seem most likely to be concerned that compliance options are too few, compliance time is too short, and compliance costs are too high, but environmental groups often have a mirror-image set of concerns: compliance options are not strict enough, the compliance time frame is too long, and so on. Moreover, if compliance concerns really are unique to business interests, then Kerwin's point here is circular: It begs the question why so many groups who have compliance concerns — that is, business groups — are those who

57. *See, e.g.*, SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 17-22 (Comm. Print 1977); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 526-29 (1972).

58. *See, e.g.*, KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 66-69, 75-78 (1986); *see also* p. 197.

59. To the extent that trade associations represent business interests, the fact that business groups and trade associations are categorized separately further understates the difference in magnitude of resources that fuels business and consumer-environmental participation. Although Kerwin's data are not decisive on the question, taken together they strongly suggest that business-oriented interests enjoy much more influence in rulemaking processes. On the other hand, however, one cannot assume that business interests are homogenous. Rivalries among business interests, and perhaps especially between big-business and small-business interests, no doubt often pit business-oriented interests against one another. For that matter, one cannot assume that consumer and environmental interests are homogenous, though they seem likely to be more so than do business interests.

participate so much in rulemaking. Either way, the observation that a high percentage of groups that participate in rulemaking raise compliance issues does not ameliorate concerns about the extent of business-oriented groups' influence on rulemaking processes relative to that of other groups.

Third, some of *Rulemaking*'s discussion is too rudimentary to be of much use to most readers. Kerwin spends a couple of pages, for instance, explaining that federal judges are appointed for life, that the federal court system has three tiers including a Supreme Court composed of nine members, and that because federal judges may have been appointed by presidents of a different political party from the one in power at any given time, there may be division among the branches about what constitutes desirable regulatory policy.[60] More distracting for lawyers, perhaps, is the fact that some of Kerwin's legal analysis is simplistic. For instance, although Kerwin rightly observes that those who would challenge a rule in federal court must first overcome several legal hurdles, his discussion of judicial review in the penultimate chapter of the book seems to conflate jurisdiction with standing with sovereign immunity with timing.[61]

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60. Pp. 251-53. For another example, Kerwin explains at length what leaders and members of working groups within agencies should keep in mind to perform their jobs effectively. Pp. 150-58. The tone of the passage strongly suggests Kerwin is addressing agency working-group personnel.

61. Pp. 254-56. Kerwin states that § 702 of the APA is a "prominent example of congressional encouragement of a more liberal doctrine of standing . . . . [in which] Congress extended judicial review to 'persons aggrieved' by a given agency decision." P. 254 (quoting from § 702). But § 702 neither extends judicial review nor grants standing. Section 702 waives sovereign immunity for suits seeking injunctive or declaratory relief. It also creates a cause of action for any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (1988). But any such person must still overcome the usual constitutional and prudential standing hurdles, *see, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Fedn., 497 U.S. 871 (1990); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), which exist independent of the APA. As for judicial review, Congress extended judicial review over agency actions in § 704, which states, in relevant part: "Agency action made reviewable by statute *and final* agency action . . . are subject to judicial review." 5 U.S.C. § 704 (1988) (emphasis added). For approximately three decades following the passage of the APA, § 704 was considered — often implicitly — jurisdictional. But since the elimination of the amount-in-controversy requirement of 28 U.S.C. § 1331 (1988), it is § 1331 — not § 704 — that extends judicial review over agency action when agencies' own statutes do not. Califano v. Sanders, 430 U.S. 99, 104-07 (1977). Today, the main substance of § 704 is its imposition of a finality requirement "on top of" § 1331. As the language of § 704 suggests, finality is, strictly speaking, jurisdictional, though Kerwin seems to suggest that finality is a judicially-developed timing doctrine (p. 256) perhaps confusing finality with the exhaustion doctrine.

Kerwin also conflates judicial review of the factual basis of an agency's rule, on one hand, and judicial review of an agency's interpretation of the statute that authorizes the agency to engage in rulemaking, on the other hand. He thus argues that the Supreme Court's decision in Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), and the Court's decision in Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), manifest "strongly contrasting views of the role courts should assume when considering challenges to agency rulemaking." P. 260. These cases, however, presented rather different legal questions. In *State Farm*, the Court stated that a rule will be found arbitrary

The worst of *Rulemaking*'s few vices, however, is its belated treatment of "theory." Not until the last chapter does Kerwin turn to theories of rulemaking. Oddly, he begins with an apologia for the discussion to come:

> Practical, pragmatic readers are no doubt casting a wary eye on the title of this final chapter ["Rulemaking: Theories and Reform Proposals"]. They likely value facts, cold-eyed realism, and a problem-solving attitude. For many, "theory" connotes a painfully abstract or irrelevant academic exercise too removed from the problems of the real world to help those who must live with them, or try to solve them. [p. 271]

He then goes on to justify the topic in entirely unobjectionable but, one would have thought, unnecessary terms:

> [A] theory of rulemaking is not a luxury [but] an indispensable tool for all students of rulemaking, whether their interests lie in scholarship or practice.
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> . . . .
>
> . . . Whatever the motivation of those who would change the rulemaking process . . . they should at least be sure that the actions they contemplate are likely to produce the results they desire. [pp. 270-71]

Indubitably. Empirical work uninformed by theory is no more useful than theory ungrounded by empirical work.

But having justified his turn to theory, Kerwin treats the subject at once too broadly and too narrowly. On one hand, he argues that a theory of rulemaking must answer three questions: (i) Why has rulemaking come to play a crucial role in lawmaking? (ii) What determines rulemaking's results? and (iii) What are the implications of rulemaking for our constitutional system? With these tests in mind, Kerwin further argues that a "review of what we know about each of these questions strongly suggests that a comprehensive theory of rulemaking is well within our grasp" (p. 272). As his questions suggest, however, he really has in mind several distinct types of theories — historical theories explaining the evolution of the institution, predictive theories explaining the form that final rules take today, and legal theories justifying the existence of rulemaking agencies constitutionally. Each of these is interesting and important, but only the second is essential for the scholar and practitioner whom Kerwin addresses at the beginning of his chapter. One could enjoy a successful scholarly or political career with a deep under-

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and capricious if an agency fails to provide an adequate basis for it or, worse, offers an explanation that runs counter to the available evidence. 463 U.S. at 43. In *Chevron*, the Court stated that where a statute is silent or ambiguous with respect to a particular interpretive question, an agency will enjoy judicial deference toward its interpretation of that provision, so long as that interpretation is reasonable. 467 U.S. at 842-45. Both cases involved challenges to agency rules, but the nature of the challenges, and of the judicial resolutions of them, was distinct in each case.

standing of what determines the results of the rulemaking process — knowing exactly which variables most account for the form final rules take — and only an elementary understanding of the history and constitutional position of rulemaking agencies.[62]

Moreover, even assuming that Kerwin has identified the proper measures for assessing a theory of rulemaking, his claim that a comprehensive theory of rulemaking is within our grasp seems quite sanguine in light of his treatment of each of those measures. As for why rulemaking occurs and what the constitutional implications of rulemaking are, Kerwin has little to say. On the latter subject, he simply notes that the health of democracy depends upon how well rulemaking works.[63] On why rulemaking occurs, Kerwin goes on at some length, but his functionalist account — he explains how rulemaking serves the interests of its participants, the Congress, the President, the courts, and interest groups — does not go very far to distinguish rulemaking either from other institutions that might accomplish whatever rulemaking accomplishes or from other modes of agency decisionmaking.

He writes of Congress, for instance:

> The growth of the federal government, particularly during this century, was both the cause and the consequence of rulemaking. . . . Whether the growth of government since the onset of the Great Depression is a result of congressional responsiveness to unprompted constituency demands or due to the discovery of the electoral bullet-proofing provided by pork, the effects on rulemaking are indisputable. Congress has always chosen to cede crucial elements of the design and virtually all implementation of thousands of programs to rulemaking. Overwhelmed by demands from the public or by their own ambition, it was clear to the members of every Congress since the first that they could not provide in statutes all that was needed to define and guide public policy. [p. 273]

The fact that Congress "has always chosen" to delegate to rulemakers, however, does not tell us *why* they have done so. And whether they have done so to serve their constituency or to fuel reelection campaigns or for some alternative reason or complicated combination of reasons, is precisely what the question "Why does rulemaking occur?" seeks to ask. Granted, Kerwin does go on to say that others have argued that Congress has delegated rulemaking power to avoid difficult political issues and to increase its capacity to oversee agencies. But this raises more questions than it

62. To be sure, there may be many reasons to be interested in both the history of rulemaking and the constitutional status of rulemaking agencies, but Kerwin does not identify them when making his case that the scholar and practitioner alike should be concerned with theory.

63. Earlier in the book, Kerwin observes that the Supreme Court eventually reconciled agencies' existence with the Constitution, but offers no analysis of the issue. Pp 47-48.

answers: Is the delegation of rulemaking power overdetermined? Why did Congress decide to use rulemaking in particular to avoid difficult political decisions? What about rulemaking makes it easier to oversee than other modes of agency decisionmaking — and how do we know?

On the more central question of what determines the content of final rules, Kerwin's discussion is more developed. Here he outlines the basic tenets of competing predictive theories of rulemaking, explaining the basic division between the "bureau-dominance" school associated with Niskanen[64] — according to which agencies are the dominant partner in the Congress-agency relationship, able to further their own interests with little threat of detection by Congress — and the "principal-agent" school associated with Noll and Weingast[65] — according to which Congress has at its disposal several tools for keeping agencies' activities in line with congressional demands. On this question, however, Kerwin argues, persuasively, that more empirical work needs to be done before much confidence can be given to *any* answer to the question of what explains the results of rulemaking (pp. 291-92). Even if the debate about whether Congress dominates agencies or agencies dominate Congress were completely resolved — and surely the truth is somewhere in between — one would still need to know how, for example, Congress controls agencies. Which oversight techniques are effective, and in what circumstances? In response to what stimuli do various forces in Congress employ those techniques? In short, what is the set of variables most relevant to explaining the form final rules take? As Kerwin recognizes, indeed emphasizes, these are all open questions. Thus, if Kerwin is right that a comprehensive understanding of rulemaking is within grasp, certainly a very long reach is required.

III. The Future of Scholarship on Rulemaking

Also missing from Kerwin's chapter on theory is an explicit treatment of normative theory. This is not a criticism, but rather an observation about *Rulemaking*'s scope. Kerwin does close his book

64. *See* William A. Niskanen, Jr., Bureaucracy and Representative Government (1971).

65. *See* Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588 (1989); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Organization 243 (1987); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. Pol. Econ. 765 (1983); *see also* Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. Econ. & Organization 93 (1992). For a critique, see Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 Legis. Stud. Q. 475 (1987).

with a brief discussion of several rulemaking reform proposals, but without connecting these proposals to their corresponding visions of what rulemaking should look like, notwithstanding that every reform proposal necessarily presupposes a commitment to some alternative regime deemed more preferable than the system of rulemaking we now know. Nor does Kerwin develop at any length his own normative account of rulemaking.

And yet, on one level, a normative vision of rulemaking pervades Kerwin's book; it is the subtext of *Rulemaking*. Throughout the book, Kerwin implies that rulemaking becomes more desirable as rulemaking agencies become more accountable to those whose interests are implicated by proposed rules. Accountability, again, takes direct and indirect forms. Agencies are directly accountable to the extent that rulemaking processes themselves are amenable to participation by all implicated interests; agencies are indirectly accountable to the extent that effective congressional and presidential oversight advances those interests. Kerwin's own rulemaking reforms, then, appear between the lines, and on a high level of abstraction: Reform measures that would render rulemaking processes more open to participation, and — to the extent that Congress and the President are themselves sufficiently accountable to their constituencies to ensure that their oversight of agencies furthers all implicated parties' interests — reform measures that would render agencies more accountable to Congress and the White House would be desirable.

Kerwin never calls for reform directly, but the general message that greater accountability both improves the quality of final rules and enhances the political legitimacy of rulemaking as an institution pervades his overlapping discussions of information, participation, and accountability.[66] For example, in an early passage on "mechanisms of accountability," Kerwin notes that rulemakers are subject to layers of constraints imposed by the other branches, and suggests that the most problematic aspect of accountability is that those constraints sometimes conflict with one another (pp. 70-71). The mere fact that rulemakers are constrained by the other branches does not worry Kerwin because he assumes that Congress and the President are in turn accountable to their constituencies.[67] Were Congress and the President *not* accountable to their constituencies, one would have to consider whether their oversight constituted a cor-

66. At one point, Kerwin writes: "The opportunity to participate in the development of rules lends the process an element of democracy not present in other forms of lawmaking." P. 65.

67. The assumption is explicit. Kerwin writes: "Congress is driven by the interest of constituents and expects those who write rules to be responsive to them as well. . . . The president is driven by what he perceives to be his mandate from the entire electorate or at least those segments who supported him." P. 71.

rupting force on rulemaking. But Kerwin skips over this issue and examines coordination among those to whom agencies are accountable. Later, Kerwin relaxes the assumption that the White House is accountable to the citizenry, and only then does he suggest that presidential oversight is not unambiguously desirable (pp. 239, 248). To the extent that oversight is a proxy for participation, and only to that extent, is more accountability to the elective branches better.[68]

For another example illustrative of Kerwin's attitude toward participation, Kerwin states in his introduction to the chapter on the subject that participation both enables agencies to gather needed information and generates greater compliance by those who have participated in the development of a rule (pp. 161-62). The implications for rulemaking here are apparent: All else equal, innovations to rulemaking procedures that would facilitate participation and accountability would improve the rulemaking regime. Of course, the gains of any such improvements would have to be balanced against whatever disadvantages heightened participation and greater accountability might bring. But participation and accountability, at least taken alone, are desirable.

Although the subtext of *Rulemaking* thus reveals Kerwin's general normative orientation, the book contains no specific prescriptions for nuts-and-bolts changes to existing rulemaking processes. Nowhere does Kerwin explain how particular rulemaking procedures should be changed to facilitate participation. And nowhere does he explain exactly how congressional or presidential oversight mechanisms should be strengthened.[69] This stands to reason, for *Rulemaking* also supplies — again between the lines — a critique of nearly all rulemaking reforms, given the current state of knowledge about how actual rulemaking processes work, and to whose benefit and at whose cost. This is true because most reform proposals presuppose not only a normative theory about what rulemaking should look like, but also a fairly well-developed understanding of what rulemaking in fact looks like. Indeed, reformers intended precisely to narrow the gap between what the regime looks like and what it should look like. But as already explained, and as Kerwin himself repeatedly points out, a robust descriptive theory about how rulemaking actually works must await the future. Consequently, great confidence in specific reform proposals must await the future as well. Should rulemaking procedures provide greater

68. Kerwin's normative orientation resurfaces again at the end of the book, at which point he argues that rulemaking cannot be fully understood divorced from the larger political system of which it is part and that to seek "fundamental reform [of] rulemaking without reform of these larger institutions and forces is futile." P. 296.

69. Indeed, Kerwin is somewhat ambivalent about congressional and presidential oversight, given that oversight can be used to further special interests at the greater expense of general interests.

avenues for public participation in the form of more demanding notice requirements, for example? Maybe, depending on the extent to which existing notice requirements adequately inform the public, who is already participating, and the consequences of such participation.[70] At the moment, too little is known about these matters to say with confidence.

Nevertheless, rulemaking reform proposals with committed sponsors abound. In the wake of the last congressional election — and since the appearance of *Rulemaking* — reform proposals to change rulemaking processes have become highly salient. The latest version of the House of Representative's regulatory-reform bill — the "Regulatory Reform and Relief Act,"[71] a subdivision of the "Job Creation and Wage Enhancement Act"[72] — would alter current rulemaking procedures substantially. Under the proposed act, agencies would be required, for example: to promulgate in the *Federal Register* a notice of intent to propose a rule ninety days prior to proposing a rule, to publish concurrently with all "major"[73] proposed rules a "Regulatory Impact Analysis" setting forth estimated costs and benefits of the proposed rule, to hold a public hearing on any proposed rule that generated comments from one hundred or more individuals ("acting individually"), to extend the period for comment by thirty days any time one hundred or more individuals request such an extension,[74] and to publish with final rules the

70. A better understanding of how rulemaking works is a necessary but not a sufficient condition to justify enthusiasm in particular reform proposals. Also required is some way to balance the sometimes competing values and norms that animate reform proposals. For example, increased notice requirements might advance the goal of generating greater participation in rulemaking by parties previously uninformed about agencies' agendas, but such notice requirements might also extend the time period required to complete a rule, thus thwarting the goal of agency efficiency. As Kerwin points out, trade-offs are necessary. Pp. 118, 178, 181.

71. H.R. 926, 104th Cong., 1st Sess. (1995).

72. H.R. 9, 104th Cong., 1st Sess. (1995).

73. As of this writing, H.R. 9 defines "major rule" as:

> any rule subject to section 553(c) [of the APA] that is likely to result in —
>
> (A) an annual effect on the economy of $50,000,000 or more;
>
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, *or*
>
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets . . . .

H.R. 9, 104th Cong., 1st Sess. § 321 (1995) (emphasis added).

74. The bill's provision for extending the period for comment reads: "[The agency] . . . shall provide *an additional* 30-day period for making those submissions . . . ." H.R. 9, 104th Cong., 1st Sess. § 203 (1995) (emphasis added). But the APA provides no thirty-day period currently. Rather, § 553 simply requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c) (1988). The period for comment, then, is determined by the particular rulemaking agency's statute, policy, or practice. When agencies are not prescribed by law to allow a specific amount of time, courts consider the sufficiency of the time allowed for comment using essentially a reasonableness standard. *See, e.g.*, Florida Power & Light Co. v.

agency's response to whatever substantive comments it received. These particular reform proposals are new only in their partisan packaging. Students of administrative law, representing a wide range of the political spectrum, have long argued for various reforms of rulemaking processes.[75] But as Kerwin rightly observes (pp. 89-90), and as the general tenor of *Rulemaking* implies, reform proposals risk committing the nirvana fallacy to the extent that they are not supported by a robust descriptive theory of rulemaking.[76]

This is not at all to argue that students of administrative regulation currently know nothing about how rulemaking processes actually work, or that debates over various rulemaking reform proposals are hopelessly uninformed.[77] Empirical work is not new

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United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (holding that 15-day comment period not unreasonable in specific circumstance of the case), *cert. denied*, 490 U.S. 1045 (1989). The bill's provision seems born of confusion for the second reason that President Clinton's Executive Order 12,866, *supra* note 22, already instructs agencies to provide at least a 60-day period for comment. *Id.* § 6(a)(1), 3 C.F.R. at 644.

75. *See* pp. 89-120.

76. Admittedly, lack of understanding about how rulemaking processes actually work implies a critique not only of fundamental reform proposals, but also of impassioned resistance to such proposals. After all, without great confidence in any descriptive theory of rulemaking, who can say that a particular reform will deliver more harm than good? *But see* OMB WATCH, EYE OF THE NEWT: AN ANALYSIS OF THE JOB CREATION AND WAGE ENHANCEMENT ACT (1994) (providing a critical summary of the Republican reform effort by a public-interest watchdog group); Gregory S. Wetstone, *And Now, Regulatory Reform*, N.Y. TIMES, Feb. 23, 1995, at A23 (critiquing House bill's regulatory reform measures).

The minority view accompanying the House Report on H.R. 9, states:

> [The Democrats] strongly support the goal of improving federal regulatory programs through greater use of risk assessment, cost-benefit analysis, and peer review. . . .
>
> . . . The question is not whether regulatory reform is important — but rather how to achieve it in the most cost-effect and responsible manner.
>
> . . . H.R. 9 as reported will create many new layers of bureaucracy, clog the regulatory process, invite litigation, and impose substantial new costs on the federal treasury while doing little to improve the efficiency of our regulatory agencies.

H.R. REP. NO. 33, 104th Cong., 1st Sess. 69 (1995). The Democrats may well be right. Interestingly, however, two of the specific measures of the proposed Regulatory Reform and Relief Act echo reforms of the Carter Administration during what Kerwin calls the "participation revolution" of the 1970s. P. 170. Executive Order 12,044, *supra* note 22, required agencies to provide advance notice of a proposed rulemaking and to provide for a comment period of at least 60 days. P. 174. At that time, such changes were undertaken by a different political party animated by a different ideology and motivated by a somewhat different set of concerns. Kerwin cites a report that the OMB undertook to try to evaluate the effects of Executive Order 12,044's requirements that concluded that the effects of these two reforms were mixed and marginal. P. 175.

77. It may be noteworthy, however, that one can find reasonable positions on either side of most reform debates. Consider, for example, the recommendation by Vice-President Gore and the National Performance Review — the successor to the Regulatory Analysis Review Groups (Carter Administration), the Task Force on Regulatory Relief (Reagan Administration), and the Competitiveness Council (Bush Administration) — that agencies make greater use of negotiated rulemaking. According to the Review's report, agencies should employ negotiated rulemaking processes more often because negotiated rulemaking results in faster rulemaking, greater consensus among interested parties, and, with the latter, less litigation. *See* AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 118-19, 167 (1993). Secretary Reich has also advocated greater reliance on negotiated rulemaking. *See* Robert B. Reich,

to students of administrative law.[78] And important work on rulemaking in particular has already been done. In addition to the scholarship on the legal dimensions of rulemaking, scholars have completed significant work on information, participation, and accountability in the context of a few particular rulemaking programs.[79] There is also a substantial economics literature on the economic consequences of certain agency decisions.[80] Thus, neither

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Regulation by Confrontation or Negotiation?, HARV. BUS. REV., May-June 1981, at 82; *An Introduction to Negotiated Rulemaking* (U.S. Dept. of Labor video) (27-minute promotional video featuring Secretary Reich, among others, urging other agencies to explore negotiated rulemaking); *see also* ADMINISTRATIVE LAW COUNSEL, U.S. DEPT. OF LABOR, NEGOTIATED RULEMAKING HANDBOOK 17 (1992) (explaining that negotiated rulemaking "shall be actively considered for use by all DOL agencies exploring the possibility of rulemaking"). Whether the Review's and the Labor Secretary's prescriptions are well founded, however, is difficult to say. For one thing, negotiated rulemaking quite possibly is well suited for rulemaking by agencies concerned with labor issues but ill-suited for rulemaking agencies generally. This is true because negotiated rulemaking raises general concerns about the representativeness of those involved in the negotiation. To the extent that rulemaking by the Department of Labor implicates a small number of interests, labor and management, both of whom are traditionally well represented, generic concerns about the representativeness of negotiated rulemakers may not be present.

Absent systematic study, how do we know whether the net effects of negotiated rulemaking are generally desirable relative to ordinary rulemaking? Thoughtful administrative law scholars who have considered the matter disagree about the promises and dangers of negotiated rulemaking. *Compare* Harter, *supra* note 25, at 28-31 (advocating negotiated rulemaking due to several benign consequences) *with* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest — EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (arguing that negotiated rulemaking tends to subvert the public interest to the benefit of private interests). This reasonable disagreement supports the case that more empirical research is necessary.

78. *See, e.g.*, Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987); Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1 (1986); Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Williams, *supra* note 26; *see also* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

79. *See, e.g.*, MAGAT ET AL., *supra* note 34; THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 27-176 (1991); Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51 (1981); Funk, *supra* note 77; Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative State (1994) (unpublished manuscript, on file with author).

80. Although this work seldom distinguishes explicitly among modes of agency decisionmaking, often the context of the particular regulatory decision or policy makes clear whether an agency's decisions took the form of rules. For a few of many examples, see Ann P. Bartel & Lacy Glenn Thomas, *Predation Through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J.L. & ECON. 239 (1987); Shelby D. Gerking & William Schulze, *What Do We Know About the Benefits of Reduced Mortality from Air Pollution Control?*, AM. ECON. REV. PAPERS & PROC. May 1981, at 228; Richard A. Ippolito & Robert T. Masson, *The Social Cost of Government Regulation of Milk*, 21 J.L. & ECON. 33 (1978); John C. Panzar, *Regulation, Deregulation and Economic Efficiency: The Case of the CAB*, AM. ECON. REV. PAPERS & PROC., May 1980, at 311; Nancy L. Rose, *The Incidence of Regulatory Rents in the Motor Carrier Industry*, 16 RAND J. ECON. 299 (1985).

social scientists nor administrative law scholars seeking a deeper understanding of how rulemaking works need start from scratch.[81]

Still in all, as Kerwin repeatedly observes,[82] empirical work on rulemaking is relatively rare. Certainly compared to the literatures on such subjects as judicial review of agency rules, and compared also to recent advances in the application of formal methodological tools to questions that have long concerned administrative law scholars,[83] scholarly work examining who actually participates in rulemaking, how often, with what incentives, with what resources,

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81. Moreover, productive debates about such reforms as the increased use of cost-benefit analyses in evaluating proposed rules do not require deep understanding about how rulemaking processes work. Although a cost-benefit proponent would need to know enough about rulemaking to know whether conducting cost-benefit assessments of proposed rules is feasible, one's position on normative questions about the most desirable aims of rulemaking need not depend on advanced understanding of how rulemaking works in practice. Finally, one can always engage in spirited debate about which experimental rulemaking reforms to try next, though assessing the results of any experiment eventually requires some understanding of how rulemaking works.

82. *See, e.g.*, p. 78 ("There is scant empirical evidence on the number of petitions [to make a rule] received [by agencies] and how they are ultimately disposed of."); p. 114 ("Little systematic research has been undertaken that might establish which of these many potential causes [of delay in rulemaking] are the most common or serious."); pp. 157-58 ("Although we have evidence of an enormous amount of management activity, we have little evidence of its effect on the rules that are finally issued.... We simply lack most of the basic information needed to evaluate various levels and systems of managing rules."); p. 192 ("Analyses of official rulemaking records and surveys of interest groups pertaining specifically to their involvement in the development of rules are as rare as hens' teeth."); *see also* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987). According to Mashaw and Harfst, "The normative expectations of administrative lawyers have seldom been subjected to empirical verification of a more than anecdotal sort." *Id.* at 275. And as Peter Schuck and Donald Elliott add, "[D]ifferent observers... rely upon different anecdotes." Schuck & Elliott, *supra* note 78, at 987; *see also* Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347 (1995) (attributing lack of empirical scholarship among legal academics in large part to lack of training, based on responses to telephone survey of law professors); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL ED. 323 (1989) (listing reasons why statistical inference is rare in legal scholarship and calling for more of it).

83. *See supra* note 65; *see also* David Epstein & Sharyn O'Halloran, Administrative Procedures, Information and Agency Discretion: Slack vs. Flexibility (June 1993) (unpublished manuscript, on file with author); David Epstein & Sharyn O'Halloran, Interest Group Oversight, Information and the Design of Administrative Procedures (Aug. 1993) (unpublished manuscript, on file with author).

In addition to axiomatic models based on or inspired by the principal-agent relationship, some scholars (chiefly Terry Moe) have begun to bring the insights of institutional economics to bear on agency behavior, providing yet further cause for excitement among students of administrative law. *See* Terry M. Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, *in* 2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 236 (1987); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, J.L. ECON. & ORGANIZATION, Special Issue 1990, at 213; Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989). For an excellent exploration and synthesis of the relationship between positive political theory, including the new institutionalism, on one hand, and some of administrative law scholars' traditional concerns, on the other hand, see Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994).

and with what effect is sparse. More empirical work — whether surveys and descriptive statistics like Kerwin's or case studies or inferential statistics — would both complement recent advances in the field and lend needed grounding to ongoing reform debates.

Conclusion

Kerwin begins his book by stating that "it is time for social scientists to match the effort and insights of legal scholars" in their attempt to understand rulemaking (p. xii). It is also time, one might add, for legal scholars to complement their understanding of rulemaking by integrating the social scientists' methodological tools in the pursuit of better understanding of how rulemaking actually works and, only then, how it might be made to work better. For although legal scholars' efforts have indeed yielded many insights in the rulemaking area, the legal scholarship has occasionally suffered from a lack of empirical grounding in social-science research methods, just as the social-science scholarship has occasionally suffered from a lack of understanding of the law that defines and shapes the political institutions many social scientists study. The happy marriage of law and social science would make *Rulemaking* worthwhile under the terms Kerwin set: "[I]f it does nothing else, this book will be worthwhile if it prods other scholars to examine some phase of rulemaking" (p. 297). In the meantime, the book does do something else: For the newcomer, *Rulemaking* is a solid introduction to the subject; for administrative law scholars and administrative lawyers, it is a sensible if simple overview that adds to what is known about making rules in an interesting and instructive way.